

**Advisory Committee on Supreme Court Rules 123 and 125**  
**DRAFT MINUTES**  
**August 27, 2012**  
**Conference Room 230**  
**State Courts Building, 1501 W. Washington, Phoenix, AZ 85007**

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**Present:** Mike Baumstark, Yvonne R. Hunter, Judge Carey S. Hyatt, Michael K. Jeanes, Gary Krcmarik, Judge Robert Carter Olson, Patricia Sallen.

**Absent/Excused:** Patricia Noland, David Bodney, Emily Johnston.

**Guests:** Aaron Nash (Maricopa County Clerk's Office), Therese Martin (Attorney General's Office), Jennifer Greene (AOC).

**Staff:** Melinda Hardman (AOC), Kay Radwanski (AOC), Kym Lopez (AOC).

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**CALL TO ORDER**

With a quorum present, the August 27, 2012, meeting of the Advisory Committee on Supreme Court Rules 123 and 125 was called to order by Mike Baumstark, Chair. Members and staff introductions were made around the room.

**APPROVAL OF DRAFT MINUTES**

The draft minutes of the July 23, 2012, meeting of the Advisory Committee on Supreme Court Rules 123 and 125 were presented for approval.

**MOTION:** Yvonne Hunter moved to approve the July 23, 2012, draft meeting minutes as presented. **SECOND:** Gary Krcmarik. **VOTE:** Motion passed unanimously.

**ISSUES AND PROPOSED MODIFICATIONS TO SCR 123**

*Family Law and Protective Orders*

Kay Radwanski reviewed the committee's task of deciding what family law information can be published online and whether amendments to Rule 123 are necessary.

Discussion ensued, with a focus on current Maricopa County practice in which published minute entries includes under-advisement rulings. Under-advisement rulings often include findings of fact and conclusions of law in contested matters, offering the most potential for inclusion of sensitive information.

Noting that publication of minute entries online provides a service to both in-state and out-of-state individuals seeking information about a case, Maricopa County is considering development of an internal procedure to prevent sensitive information from being published online in a family law minute entry. A minute entry would be prepared in the same manner it is now, except that matters taken under advisement would be coded to prevent them from being published online. An implementation date for this procedure has not been determined, and judges would need training on it. Maricopa County believes it can implement this new process without changing

Rule 123. Additionally, Maricopa County is striving to develop a procedure for assigning a sub-code to protective order cases (Orders of Protection and Injunctions Against Harassment) that are filed into existing family court cases to keep the protective order information from being published online.

A member questioned how the courts should control the information the public can access, asking at what point the judiciary shifts from being a public court to a publisher of information for the public. It was noted that courts attempt to be as transparent and public as possible without jeopardizing an individual's private information. The public's interest is not served by publishing private information, and with advances in technology, there is a greater concern for the privacy of an individual. It was acknowledged that privacy issues are not violated if only basic information is published online.

As to the proposed modification to SCR 123(g)(1)(D)(ii) regarding family law and protective orders, it was suggested that federal law limitations on Internet publication of certain information be restated but not expanded. Law enforcement officers needing access to confidential information about a party can obtain additional information through law enforcement databases that are not available to the public. Members agreed to mirror the language from the U.S. Code in the proposed SCR 123 modifications. The addition of this language gives some flexibility and complies with the law.

A member suggested that language be included in the rule that would allow some family law documents to be posted online when technology is available that can redact specific information from them. Certain information could be blocked rather than taking the entire record offline.

It was also suggested that the committee recommend that family law case dockets be available for viewing online as long as information regarding a protective order is redacted. It was noted that the defendant's name is not redacted from the docket when a protective order is issued. Currently, Tier 1 users are authorized to see the image of a protective order in their own case; Tier 2 users must register and pay a fee to see document images, except for protective orders, in others' cases; and Tier 3 users are unable to view protective orders. Tier 2 users have access to certain civil case records but not juvenile, paternity, family law, or protective orders.

Currently, under SCR 123, family law case information may be provided online but not rulings, orders, or decisions. A member noted that clerks should not have to make legal decisions as to whether a statement from the court should be placed in a document titled as a minute entry or a document titled as a ruling, order, or decision, etc.

A member noted that the purpose of publishing records online is to let people know there is important information available in a case. Courts should have an open court and open records policy. Training would be beneficial in preventing confidential information from being published online. A member raised a concern that judges might be criticized for making decisions about

what information goes into a minute entry that will be published online and what information goes into an order that will not be published online. It was suggested that minute entries setting forth decisions made during court hearings be published online while those setting forth decisions taken under advisement be coded differently to keep the under-advisement decisions from being published online.

Rule 125(b) provides that a court order or ruling is a record of any out-of-court decision. This can be emphasized in Rule 123 if it is modified to provide that an out-of-court ruling cannot be published online. If a different code is designated for an out-of-court ruling, the document can be labeled as an order instead of a minute entry to make the distinction clear. Maricopa County feels this proposal has the flexibility to allow the court to meet its electronic delivery needs, but Maricopa County would prefer to leave the language of the rule as is.

#### *Probate Law (Title 14)*

SCR 123 currently allows only four data elements to be posted online in probate cases: party names, case number, judicial assignment, and attorney names. The docket or register of actions may not be posted online. Attorneys and parties have access to documents in their own cases through Tier 1.

Currently in probate matters, which consist of guardianships, estates, and trusts, the name of a minor can be published online because the minor's name is part of the case title. Committee members agreed that the minor's name should be available as published information. There is concern that an adult's name linked with a guardianship or conservatorship might hold a stigma for the adult. A member noted that a request to seal the file can be made to keep the adult's name confidential and offline. The committee concluded that an adult's name in a guardianship or conservatorship case can continue to be made available online.

The docket or register of actions is a listing of documents filed and actions taken in a case. Out-of-state family members do not have access to documents filed in probate cases because they generally are not Tier 1 users. If a probate case docket cannot be posted online, any county currently publishing it online would have to stop that practice. The example was given that an out-of-state reporter, who previously received remote electronic access to the docket – contrary to Rule 123 - would have to fly to Arizona, appear before the court and pay a filing fee, requesting to be named as an interested person in the case, to obtain access to this information online. If the policy recommendation is that the probate docket cannot be accessed online, the ability to easily monitor what is happening in a case would be precluded. A member suggested that the register of actions could be published in estate cases but not in other types of probate cases. The pending rule petition filed by Judges Davis and Mroz seems to also request remote electronic access to probate case documents.

The consensus of the committee is that the four data elements that SCR 123 currently allows to be posted online in probate cases should not be expanded. Online access should not be provided to probate case dockets, minute entries, or documents.

Michael Jeanes noted that Maricopa County probate case minute entries had been posted online for ten years, until recently, without any problem.

#### *Mental Health Law (Title 36)*

Mental health cases, although often handled in probate court, are not probate cases governed by the probate rules. These cases are governed by a separate set of statutes – Title 36. SCR 123 currently allows only four data elements to be posted online in mental health cases: party names, case number, judicial assignment, and attorney names. The federal HIPPA law regarding access to medical records does not apply to courts. A question arose as to whether that means the court can publish medical information and records in a way that others cannot.

A.R.S. § 36-509(B) provides that information and records obtained in the course of evaluation, examination or treatment and submitted in a court proceeding are confidential. It is unclear whether this section of the statute applies to health care entities or to courts. Current practice in the courts is that when these documents are brought to the court for filing, they are placed in an envelope labeled *confidential* and put into the file. A.R.S. § 36-509(B) also provides that information and records submitted in a court proceeding that are not clearly identified by the parties as confidential are public records.

A member asked what adjudicatory function is being served by publishing the four mental health case data elements online. What harm is done to the public interest or otherwise if the committee were to recommend that no mental health case information be published online? It was noted that this is a special area of the law where the individual named in the case title has not done anything wrong but has gotten sick. The information published online will always remain online even if the person is rehabilitated. It was noted that if this information is not published online, it is possible that interested family members would not know the mental health case exists.

The inclination of the committee is to protect the privacy of the individuals who find themselves in mental health proceedings. A guest noted that the prior Rule 123 Committee had recommended allowing the four data elements to be published online in case anyone wanted to challenge the case and request that the court overturn its order. If a case number and case names are sealed by the judge, a person would not know that the case exists. It was suggested that the committee take a more in-depth look at Title 36. The committee can include in its report to AJC an explanation that while mental health cases are not specifically set forth in the charge of the committee, the committee discussed mental health cases and recommended against posting these four data elements online for general public access. Other members stated that they did not know enough about mental health cases to make an informed recommendation.

### *Miscellaneous*

Ms. Hardman proposed an edit to SCR 123(g)(1)(D)(i) to resolve any confusion surrounding the term *closed* (meaning confidential) and *closed* (meaning disposed of or concluded). A member noted that whether a case is identified as confidential or closed does not make the statement in the rule clearer and suggested that the phrase be removed completely. The section would then provide: “the following data elements in juvenile delinquency, mental health, probate, and criminal cases in which a juvenile is alleged to be the victim . . . .” The members agreed this language was preferable.

Ms. Hardman also proposed a change to SCR 123(g)(C) to provide that “Members of the public who hold an Arizona driver license, non-operating identification license, *or other acceptable form of identification, as determined by the Administrative Director, and complete registration pursuant to ACJA § 1-604*, may be provided remote electronic access . . . .” The rule currently reads: “Members of the public who hold an Arizona driver license or non-operating identification license may be provided remote electronic access... .” A member explained that the AJC is currently negotiating with a vendor to provide a PACER-like system in Arizona, which would allow broader access to court data and documents across the state. The vendor of this system, once selected, is expected to offer greater sophistication in registering individuals and identifying persons who are permitted to receive access to court data and documents. Consensus was not reached, so this proposed change will be discussed further at the next meeting.

The Chair advised that members should be prepared to stay beyond 2:00 p.m. at the next meeting.

### CALL TO THE PUBLIC

No response.

### ACTION ITEMS PRESENTED BY CHAIR

- Prepare a draft petition and appendix proposing SCR 123 modifications to allow certain family law minute entries to be published online. Present this proposal at the committee’s next meeting.
- Construct language to change Rule 123(g)(C)(i).

*Meeting adjourned at 1:45 p.m.*

**Next Meeting:** October 18, 2012

10:00 a.m. – 2:00 p.m.

Arizona State Courts Building

Conference Room 119B